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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of

Section 257 Proceeding to Identify and Eliminate
Market Entry Barriers for Small Businesses

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GN Docket No. 96-113

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**REPLY COMMENTS
OF THE
SMALL CABLE BUSINESS ASSOCIATION**

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SUMMARY

The Small Cable Business Association ("SCBA") submits these reply comments to highlight two critical entry barriers facing small cable:

- Pole attachment abuse by rural cooperatives; and
- Abuse of municipal authority to regulate cable providers and telecommunications providers.

Section 257 directs the Commission to investigate both of these substantial barriers to entry.

Concerning pole attachments, SCBA requests that the Commission investigate the unreasonable rate increases and other abusive conduct of rural cooperatives toward small cable. The results of this investigation will show that Congress should remove the rural cooperative exemption for pole regulation.

Concerning abuse of municipal regulatory authority, SCBA requests that the Commission investigate problems arising in the cable franchise renewal contest and report to Congress that additional federal protections are necessary. SCBA also requests that the Commission provide strong leadership in preempting municipal attempts to impose burdensome and costly requirements on telecommunications permits.

Commission action on these issues will significantly advance small cable's ability to expand cable and telecommunications services in areas not served by larger providers.

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**REPLY COMMENTS
OF THE
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I. INTRODUCTION

SCBA replies to two of the most critical small cable issues raised by commenters in this proceeding - pole attachment abuse by rural cooperatives and abuse of municipal authority to regulate cable operators and telecommunications providers. These issues endanger small cable's ability to expand cable service and introduce new and competitive telecommunications services. SCBA asks the Commission to consider carefully these issues. The viability and vitality of small cable and other small facilities-based telecommunications providers will rely, in part, on strong Commission leadership and vigilance in these areas.

II. THE COMMISSION MUST INFORM CONGRESS OF THE ENTRY BARRIERS IMPOSED BY POLE ATTACHMENT ABUSE BY RURAL ELECTRICAL AND TELEPHONE COOPERATIVES.

Many small cable systems serve rural markets. Aerial plant predominates in these regions. As a result, reasonable access to poles represents a cornerstone of any facilities-based cable or telecommunications venture in these regions. Federal law offers some protection from unreasonable

pole rates.¹ Unfortunately, rural electrical and telephone cooperatives are exempt from federal restrictions.² Many of the markets served by small cable overlap those served by rural cooperatives. Many rural cooperatives have exploited their regional pole monopolies. Significant abuse of pole attachment rates and terms has resulted.

A. Rural cooperatives continue to subject small cable to unreasonable pole attachment rate increases.

Many small cable companies dealing with rural cooperatives have faced double and even triple digit increases in attachment fees. SCBA and other commenters have identified this problem.³ SCBA has obtained additional data from its membership for these reply comments.

In Florida, one SCBA member has recently faced an unreasonable pole attachment rate increase. In the past year, the rural electrical cooperative hiked per pole attachment rates to \$15/year from \$10/year. Throughout negotiations, the cooperative insisted that \$15/year represented the market rate. This was nonsense. The cable company pays \$5/year to regulated utility pole owners in the region. This situation epitomizes the monopoly abuse by unregulated rural cooperatives.

The cable operator rented space on about 1000 poles for this rural system serving 600 subscribers. The rate abuse by the unregulated cooperative resulted in a per subscriber cost of \$25 per year compared to \$8.33 per year for regulated poles. There is no cost justification for this disparity.

¹47 U.S.C. § 224.

²47 U.S.C. § 224(a)(1).

³SCBA Comments at 21-22; Comments of Cole Raywid & Braverman on Pole Attachment Issues at 7 (filed May 20, 1996); National Cable Television Association Comments at 15-16; Testimony of Matthew M. Polka, FCC Forum on Small Business Market Entry Barriers (filed September 26, 1996) ("Polka Testimony") at 3-4; Comments of Southwest Missouri Cable TV, Inc. at 1 (filed September 26, 1996).

In Louisiana, another SCBA member faced a nearly identical increase by a rural electrical cooperative. SCBA members from numerous other states including Georgia, Missouri, Maine, Texas and Colorado report similar unjustifiable increases. In many instances, steep hikes in pole rates coincide with the rural cooperatives commencing distribution of DBS dishes.

Unreasonable and uncontrollable pole attachment rates represent a critical barrier to expansion and entry for small cable.

B. Rural cooperatives subject small cable to unreasonable and costly pole attachment terms and conditions.

Compounding the rate abuse problems, many small cable operators confront unreasonable terms and conditions in dealing with cooperatives. Several cable operators report that cooperatives will approve initial installation configurations, subject to payment of steep make-ready costs on cable operators. Later, the cooperatives unilaterally change terms and impose additional make-ready or even pole replacement costs on cable operators. In many cases cooperatives raise these "concerns" suddenly only after receiving notice that the cable operator seeks to transfer pole attachment rights as part of a system sale. Cooperatives have sought to interfere with the efficient transfers of cable systems, holding up a sale to extract additional money from cable operators.

C. Unreasonable pole attachment costs and uncertainty represent barriers to entry.

Pole attachment abuse has already created a barrier for the types of innovative telecommunications ventures that the 1996 Act promotes. For example, one SCBA member recently negotiated a joint venture fiber network build with a small local exchange carrier. Much of the plant was to use poles controlled by rural cooperatives. The huge uncertainty in the economics of pole attachments and make-ready costs helped to scuttle the venture.

SCBA recognizes that the Commission alone cannot remove these barriers to entry. Congress created an express exemption for rural cooperatives almost 20 years ago. But times have changed. The exemption aimed at fostering growth in the distribution of electricity and telephone services in rural areas has become a barrier to telecommunications expansion. Under Section 257(c), the Commission can report these problems to Congress and recommend the elimination of the statutory exemption that many rural cooperatives now abuse.

III. THE COMMISSION MUST CAREFULLY RESTRICT MUNICIPALITIES ATTEMPTS TO IMPOSE ENTRY BARRIERS THROUGH THE CABLE FRANCHISE PROCESS AND THE TELECOMMUNICATIONS PERMITTING PROCESS.

Several commenters have identified the entry barriers imposed by local regulation of telecommunications providers.⁴ SCBA must underscore the need for strong Commission leadership in this area. SCBA members must negotiate cable franchises and telecommunications permits with literally thousands of municipalities. Abuse of authority by local regulators occurs constantly and imposes high per subscriber costs on small cable. By seeking to maximize revenue and free services from telecommunications companies, often through means contrary to federal law, local regulators erect barriers to entry for many small cable and telecommunications companies.

A. Some municipalities abuse small cable in franchise renewals.

Many SCBA members and other small cable operators face significant abuse in the franchise renewal process. Municipalities often ignore the procedural protections of 47 U.S.C. § 546. Local politics overpowers federal protections.

For example, one small operator has recently received a notice from a city attorney that the city denied a request for formal renewal procedures. That attorney also represents the local telephone

⁴NCTA Comments at 9-12; Competitive Telecommunications Association Comments at 10-11; Testimony of Matthew Polka at 5.

company and assisted that company in obtaining a cable franchise to compete with the incumbent small operator. The mayor and city council, all cronies of the city attorney, see no problems with this obvious conflict of interest. While state and federal courts might offer some relief, small cable operators rarely have the means to litigate against municipalities.

SCBA members routinely encounter cases where cities or towns, urged by consultants, demand system upgrades wholly unrelated to community needs and costs. Municipalities also often seek compensation well in excess of the five percent franchise fee cap. For example, SCBA has learned of an ongoing renewal dispute between a small operator serving 12,000 customers and a consortium of communities. The consortium has refused to grant renewal unless the operator pays \$125,000 in consultant's fees - over \$10 per customer! Federal law notwithstanding, the local franchise authorities see the franchise renewal process as an opportunity to gain revenue and political favor. Shielded from liability for damages under 47 U.S.C. § 555A, many municipalities maintain positions directly contrary to federal law and force cable operators to choose between unreasonable franchise renewal terms, litigation or shutting down the cable system.

Most small cable operators do not have the means to litigate franchise renewal disputes. They must accept terms that include commitments to unnecessary upgrades and payments in excess of the franchise fee cap. Facing competition from DBS, MMDS and other providers that are not subject to local franchise requirements, the costly reality of franchise renewals represents a serious barrier for small cable.

The Commission can help ameliorate this barrier by initiating an inquiry into what occurs during franchise renewals. From this investigation, the Commission can recommend to Congress changes in federal law that will more affirmatively preempt overreaching by local franchise authorities. Similarly, the Commission can clearly articulate that the 1996 Act restricts local franchise authorities

from using the franchise process to restrain market-driven deployment of telecommunications services, dictate transmission technology, and mandate technical standards.

B. Municipalities seek to impose overly restrictive requirements on telecommunications permits.

In the telecommunications permitting context, small cable faces barriers to entry in municipalities that seek to require telecommunications franchises. Many municipalities have renamed these franchises as "permits" in an attempt to facially comply with the 1996 Act. Regardless of the nomenclature, onerous payment, reporting and other requirements of such "permits" impede the ability of small cable to enter into telecommunications businesses as contemplated by the 1996 Act.

SCBA supports the comments of NCTA concerning the need for forceful Commission leadership in this area.⁵ This is especially critical for small cable. Small cable cannot invest in litigation or administrative proceedings against municipalities that hold right-of-way access hostage to stiff permit application payments, access fees, and other terms.

The Commission should articulate that it will preempt any municipal regulation of telecommunications services that extends beyond legitimate and routine right-of-way management functions. Any permit fees or annual payments must be strictly cost-based. Without such restrictions, municipalities will continue to seek to extract the types of concessions and revenues to which they have become accustomed in cable franchises. The high per subscriber cost of either challenging municipal requirements or meeting the demands of municipalities will significantly hinder small cable in its attempts to expand telecommunications services.

⁵NCTA Comments at 9-12.

IV. CONCLUSION

As always, SCBA offers to the Commission its resources and the resources of its members as the Commission proceeds to dismantle the entry barriers identified in this proceeding.

Respectfully submitted,



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